Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign Licenses	WT Docket No. 12-4

PETITION TO DENY OF PUBLIC KNOWLEDGE, MEDIA ACCESS PROJECT, NEW AMERICA FOUNDATION OPEN TECHNOLOGY INITIATIVE, BENTON FOUNDATION, ACCESS HUMBOLDT, CENTER FOR RURAL STRATEGIES, FUTURE OF MUSIC COALITION, NATIONAL CONSUMER LAW CENTER, ON BEHALF OF ITS LOW-INCOME CLIENTS, AND WRITERS GUILD OF AMERICA, WEST

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Public Knowledge, Media Access Project, the New America Foundation Open Technology Initiative, Benton Foundation,[1] Access Humboldt, Center for Rural Strategies, Future of Music Coalition, National Consumer Law Center, on behalf of its low-income clients, and Writers Guild of America, West (collectively, "Petitioners") petition the Federal Communications Commission ("FCC" or "Commission") to deny the above-captioned application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC as well as the application of Verizon Wireless and Cox TMI Wireless as contrary to the public interest. Petitioners also urge the Commission to block the Applicants' related cross-sale and joint operating entity agreements.

SUMMARY

When the largest cable multisystem operators (MSOs) propose a series of joint transactions with the largest wireless company, the Commission has a responsibility to take notice. When the wireless company in question is controlled by Verizon, one of the remaining incumbent local exchange carriers (ILECs) and until now a fierce competitor with these MSOs for data, video, and voice services, the need for thorough scrutiny with a skeptical eye increases yet again. And where, as here, the Applicants have refused to make complete copies of pertinent documents available in the record—even under the strictest confidentiality—alarm bells should ring with deafening insistence.

[1] The Benton Foundation is a nonprofit organization dedicated to promoting communication in the public interest. This Petition reflects the institutional view of the Foundation and, unless obvious from the text, is not intended to reflect the views of individual Foundation officers, directors, or advisors.

It does not take the celebratory plaudits of Wall Street analysts[2] to recognize that these proposed transactions would fundamentally alter the nature of the telecommunications world in a manner utterly contrary to that intended by the 1996 Telecommunications Act. In the first place, Applicants have agreed to transfer more spectrum to the largest wireless operator, aggravating existing anticompetitive problems with spectrum aggregation. In addition, Applicants have agreed to three critical side agreements bearing on each other's businesses that give rise to serious concern that not only will these providers decline to compete further with one another, they will actively collude with one another. As explained in greater detail in the Confidential Appendix, if the companies genuinely intend to compete in good faith, the structure of these agreements make it practically impossible to do so.

What the parties characterize as "agency agreements" to become the exclusive resellers of each other's services would be bad enough. It is difficult to see how exclusive agreements between the MSOs to resell Verizon's mobile voice service, and Verizon Wireless to resell the incumbent MSOs' video services, can serve the interests of competition that lie at the heart of the Telecommunications Act of 1996. It is unclear, for example, whether Verizon Wireless could market its new joint venture with Redbox to provide streaming services as a competitor to Comcast or Comcast's Hulu. But such innovation in new video services is precisely the kind of vibrant competition the 1996 Act intended to encourage. Similarly, it would appear from the exclusivity clauses

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[2] *See* Marguerite Reardon, *Verizon's $3.6 billion spectrum deal: Who wins and who loses?*, CNET NEWS (Dec. 2, 2011), http://news.cnet.com/8301-30686_3-57335808-266/verizons-$3.6-billion-spectrum-deal-who-wins-and-who-loses/#ixzz1myz3s4Xl; Elizabeth Woyke, *Telecom Deals Ratchet Up Price Of Wireless Spectrum*, FORBES (Dec. 2, 2011), http://www.forbes.com/sites/elizabethwoyke/2011/12/02/telecom-deals-ratchet-up-price-of-wireless-spectrum/.

described by the Applicants in their public instatement that SpectrumCo providers Comcast, Time Warner Cable, and Bright House will terminate their potential partnerships with Sprint and Clearwire, and that Verizon will terminate its video resale agreement with DIRECTV. Thus, the side agreements entered into by the parties already appear to have a negative impact on competition. To "supersize" Verizon Wireless with additional spectrum from Comcast, Time Warner Cable, Bright House, and Cox so that the largest wireless operator can better promote the services of the largest incumbent cable operators directly undermines the pro-competitive policies of the 1996 Act and is thus contrary to the public interest.[3]

Even more troubling is the agreement by the parties to form a Joint Operating Entity ("JOE") "to develop innovative technology and intellectual property that will integrate wired video, voice and high-speed Internet with wireless technologies."[4] In other words, the parties will come together to jointly develop foundational patents and standards across the very areas where they should compete with one another. Control of such an intellectual property portfolio—which would include not merely patents, but proprietary standards and other critical elements for the deployment of services—is particularly troubling here. The parties jointly control approximately 40% of the wireless market, 40% of the residential broadband markets, and 40% of the residential video market. In addition, Comcast controls substantial programming interests through its

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[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[4] Public Interest Statement, attached to Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo, LLC, for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 12-4, ULS File No. 0004993617 at 24 n.71 ("Verizon/SpectrumCo Public Interest Statement"). *See also* Public Interest Statement, attached to Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 12-4, ULS File No. 0004996680, at 20 n.62 ("Verizon/Cox Public Interest Statement").

control of NBC/Universal. The technologies developed by the JOE will therefore almost immediately become industry standards, to the competitive disadvantage of competitors such as Sprint or DIRECTV.

As discussed in greater detail in the separately filed Confidential Appendix, from the material made available by Applicants, the JOE seems designed to facilitate precisely this kind of anticompetitive behavior. No amount of good faith effort to continue to compete can change the fact that the structure of these agreements, combined with the license transfers, force the parties to share vital business information, avoid expensive competition, and discriminate against rivals. It is Economics 101, known since the days of Adam Smith, that where firms have freedom to avoid competition and the ability to collude against rivals they have incentive to do so.

That these concerns are future-looking does not alter the Commission's responsibility to examine their potential and guard against them. The parties bear the burden showing that the transaction will serve the public interest. This includes a responsibility on the part of the Commission that the parties will not, at some later date, use the agreements to undermine the pro-competitive policies of the Act, either by declining to compete vigorously or by actively colluding against competitors.

Applicants have sought to characterize the agreements as independent of the transaction and outside the scope of the Commission's review. As an initial matter, the circumstantial evidence argues against this. Even if we accept that Comcast, Verizon, and the other parties negotiated the license transfer and three complex agreements concerning their core businesses independently, how did it come that Cox will join this "independently" negotiated agreement and that it will also, apparently, trade spectrum as

the price of admission to the JOE?[5] It is difficult to see how the Commission can simply rely on the assurances of the Applicants, especially when they have taken considerable pains to avoid submitting complete agreements into the record.

Even if the Commission were to ignore the totality of the circumstances, it must consider whether the agreements give rise to sufficient "influence and control" concerns that, for purposes of review under Section 310(d), the Commission can no longer consider this purely a transfer from the MSOs to Verizon Wireless. Section 652 prohibits cable operators from acquiring any "management interest" in any LEC with an overlapping territory, and prohibits any LEC, such as Verizon, from acquiring any "management interest" in any incumbent cable operator.[6] In addition, the statute prohibits certain joint ventures or partnerships with regard to provision of video or voice service.[7] As an initial matter, as explained more fully in the separately filed Confidential Appendix, Applicants have failed to comply even with the relatively modest "insulation criteria" under the attribution rules.[8] In such circumstances, it would certainly seem that the license transfer and agreements, taken together, act to frustrate the purposes of Section 652 and therefore grant of the transfer cannot serve the public interest.

In the same way, the transfer raises concerns under Section 628(b) and Section 629. Section 628(b) prohibits unfair methods of competition by incumbent cable

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[5] Verizon/Cox Public Interest Statement, 20 n.62.

[6] *See* 47 U.S.C. § 572(a)–(b).

[7] *See* 47 U.S.C. § 572(c).

[8] 47 C.F.R. § 76.501 Notes 1–5. As explained in the Confidential Appendix, it does not appear that these interests can be insulated. Even if they could be insulated, they would not address the question of whether the agreements create a "management interest" under Sections 652(a) and (b) or a prohibited joint venture under Section 652(c).

operators and other "distributors of satellite cable programming," such as Verizon.[9] Section 629 requires the Commission to promote the competitive availability of services offered over "video programming systems."[10] The JOE, the exclusive resale agreements, and the license transfers act both individually and in combination with each other to undermine these statutory goals in violation of the public interest standard of Section 310(d).

Accordingly, even if one accepted the characterization by the Applicants that this merger simply involved the transfer of spectrum from companies not able to deploy competing services effectively to one that can make better use of it, the Commission would need to void these agreements. It is impossible to see how a license transfer that enhances the ability of Verizon Wireless to operate under these agreements to the detriment of its competitors could possibly serve the public interest. Nor does it appear possible to condition these agreements in ways that would address these concerns, especially as the parties may modify the agreements to be even more blatantly anti-competitive after the transaction is concluded.

Even voiding the agreements is insufficient to ensure that the transfers serve the public interest. Verizon Wireless is the largest wireless provider in the United States. The proposed transfers would further aggravate the imbalance between the two largest providers (Verizon Wireless and AT&T) and all other facilities based providers.[11] This

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[9] 47 U.S.C. § 628.

[10] 47 U.S.C. § 629.

[11] Applicants' reliance on the spectrum screen is misplaced. Verizon/SpectrumCo Public Interest Statement, 24–25; Verizon/Cox Public Interest Statement, 21–22. As discussed below, Verizon is well aware that the Petition for Reconsideration filed after the Commission adjusted the spectrum screen upward to permit Verizon to purchase Alltel's licenses remains pending. Accordingly, the current screen must be considered unsettled and subject to adjustment at any time the

concern is further aggravated by recent Congressional action limiting the Commission's ability to use auctions to address concerns with regard to spectrum aggregation through eligibility restrictions.[12] At a minimum, the Commission would need to impose data roaming conditions to safeguard against the possibility that Verizon's challenge to the Commission's current data roaming rules succeeds. The Commission should also impose significant rural buildout conditions. If the public interest benefit from this transaction is that it will ensure sufficient wireless capacity for future demand, then the Commission should take steps to ensure that future demand is met for *all* Americans, rural as well as urban. If Verizon is unwilling or unable to meet these new deadlines, the Commission should impose "use it or share it" conditions that would allow unlicensed use of the transferred spectrum until such time as Verizon meets its build out obligations.

STATEMENT OF INTEREST

Public Knowledge ("PK") is an advocacy organization with members, including Verizon Wireless subscribers and subscribers of multichannel video programming cable service, who will be adversely affected if the Commission approves the proposed transactions. They will likely face fewer choices for wireline and wireless broadband and for cable service. Furthermore, if the agreements are permitted, Applicants may

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Commission chooses to grant the Petition. *See* Petition for Reconsideration of the Public Interest Spectrum Coalition, *Sprint Nextel Corporation and Clearwire Corporation Application for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 08-94 (filed Dec. 8, 2008). More importantly, the spectrum screen is only a guide to situations where the Commission will, in the absence of any other criteria, elect to probe more deeply. Where, as here, other factors demand that the Commission conduct a searching review of the implications of further spectrum aggregation on competition, the spectrum screen does not provide an affirmative shield against the public interest review the Commission must conduct under Section 310(d).

[12] Temporary Payroll Tax Cut Continuation Act of 2011, H.R. 3630, 112th Cong. (2012).

subsequently modify the agreements in anticompetitive ways without Commission oversight, creating higher prices for these services for PK members.

The Media Access Project ("MAP") is a non-profit, public interest law firm and advocacy organization working in communications policy. For over 38 years, MAP has promoted the public interest before the FCC and the U.S. Courts. Over that time, MAP has provided critical policy leadership and counsel to the public interest and media reform community and fought to ensure the public's right to access and to diverse and competitive telecommunications services. MAP, its employees, and the persons it represents are users of wireless broadband services, and many are customers both of Verizon Wireless and of the owners of SpectrumCo and Cox. MAP's employees and clients use the wireless devices associated with their accounts to make and receive voice calls, send and receive text messages, and use data services when they travel to various locations throughout the United States. They also receive multichannel video programming and wireline broadband access.

The Open Technology Initiative of the New America Foundation formulates policy and regulatory reforms to support open architectures and open source innovations and facilitates the development and implementation of open technologies and communications networks. This mission would be adversely affected by the transactions at issue in this proceeding.

The Benton Foundation works to ensure that media and telecommunications serve the public interest and enhance our democracy. It pursues this mission by seeking policy solutions that support the values of access, diversity and equity, and by demonstrating the

value of media and telecommunications for improving the quality of life for all. This mission would be adversely affected by the transactions at issue in this proceeding.

Access Humboldt is a non-profit, community based, public service media organization formed to manage local cable franchise benefits on behalf of the County of Humboldt, California and the Cities of Eureka, Arcata, Fortuna, Rio Dell, Ferndale and Blue Lake, and to advocate for policies in the interests of these communities. Its mission depends in part on a healthy communications landscape, which would be adversely affected by the transactions at issue in this proceeding.

The Center for Rural Strategies seeks to improve economic and social conditions for communities in the countryside and around the world through the creative and innovative use of media and communications. Its interests, and those of the people it represents, would be adversely affected by the transactions at issue in this proceeding.

The Future of Music Coalition is a national nonprofit organization that works to ensure a diverse musical culture where artists flourish, are compensated fairly for their work, and where fans can find the music they want. Its mission depends in part on a healthy communications landscape that allows artists to connect to their fans, and this would be adversely affected by the transactions at issue in this proceeding.

The National Consumer Law Center, on behalf of its low-income clients, is a nonprofit advocacy organization that seeks to build economic security and family wealth for low-income and other economically disadvantaged Americans. It joins this Petition to Deny on behalf of its low-income clients, who would be adversely affected if these transactions go forward.

The Writers Guild of America, West is a labor union composed of the thousands of writers who write the content for television shows, movies, news programs, documentaries, animation, and Internet and mobile phones (new media) that keep audiences constantly entertained and informed. Its members depend on a healthy communications landscape with that allows creators to connect to the public.

ARGUMENT

I. THE COMMISSION HAS AUTHORITY TO DENY THE PROPOSED TRANSACTIONS TO PROTECT COMPETITION AND FULFILL THE POLICIES OF THE COMMUNICATIONS ACT.

The Commission must block the proposed transactions by denying the license transfers and disallowing the joint marketing agreements and joint operating entity. The transfers of wireless licenses to Verizon would only further the increasing domination of just two carriers over the wireless market, and are in furtherance of an unlawful scheme to limit competition in the wireless and subscription video markets. The companies have announced that they intend to develop new technologies, to cross-market each other's products, and to otherwise collaborate exclusively. These stated ambitions alone provide grounds for the Commission to block the joint agreements. But even charitably interpreted, the joint agreements provide a mechanism for future collusion on pricing, building out, coverage, and other market control methods. In any event, the companies have failed to disclose the full text of their contracts, so it is impossible to know the precise nature of their plans. It is therefore necessary to assume the worst. As Adam Smith wrote, "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some

contrivance to raise prices."[13] There is no way for the Commission or any other agency to prevent the companies, once they have begun talking, from continuing their conversation into other matters. If they have the means and to motive to limit competition to their own advantage they will likely do so.

To be sure, the Commission has independent authority to prohibit the anticompetitive joint agreements. If the companies had announced their anticompetitive enterprise without even mentioning spectrum license transfers the Commission would still have good reason to block them. But it has even better reason to block them and the license transfers now. First, it must not *abet* the agreements by enabling the spectrum transfers that are the price of entry into Verizon's communications cartel. As Adam Smith also wrote, while the law may not be entirely able to prevent people of the same trade "from sometimes assembling together, it ought to do nothing to facilitate such assemblies."[14] In addition to being problematic in and of themselves, the license transfers would materially facilitate the unlawful joint agreements. Second, the anticompetitive agreements are all the worse in light of increasing spectrum concentration, lack of wireless competition, and other public interest harms that would result from the license transfers. This provides ample reason to block the entire transaction as a whole in this proceeding.

A. The Commission Has Broad Authority to Protect the Public Interest and Ensure the Effective Operation of the Communications Act.

The Commission has a broad interest in ensuring that the Communications Act ("the Act") operates effectively and that the Act's purposes are not undermined. Indeed,

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[13] ADAM SMITH, THE WEALTH OF NATIONS 129 (Oxford University Press 1998).

[14] *Id.*

the Commission is required by Section 310(d) of the Act to only approve license transfers and assignments upon finding that the transfer will serve "the public interest, convenience, and necessity."[15] In conducting its public interest inquiry, the Commission examines: (1) whether the transaction would violate a provision of the Act or other law; (2) whether the transaction would violate the Commission's rules; (3) whether the transaction would substantially frustrate or impair the Commission's statutory implementation or enforcement, or would interfere with the objectives of the Communications Act or other related statutes; and (4) whether the transaction will create affirmative public interest benefits.[16] As the Commission has consistently acknowledged, this review encompasses both an analysis of the transfer's anticompetitive effects and "the potential impact of the proposed transaction on the rules, policies and objectives of the Communications Act."[17]

Even if transactions do not violate the Act or the Commission's rules, the Commission examines proposed transfers to determine whether they would substantially impair or frustrate the enforcement or objectives of the Act and whether the transaction would produce potential public interest benefits furthering the policies of the Act, such as

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[15] 47 U.S.C. § 310(d).

[16] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order, ¶ 20 (2001) (*AOL/Time Warner Order*).

[17] *Id.* ¶ 4. *See also* Communications Act of 1934, as amended § 1, 47 U.S.C. § 151 (2006) (stating that the Communications Act was created "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . and for the purpose of securing a more effective execution of this policy by centralizing authority . . . and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication" in the Commission to implement and enforce the Act.).

the preference for competitive telecommunications markets, preserving and enhancing competition in related markets, ensuring a diversity of voices in media and communications, ensuring the existence of diverse platforms and providers, and promoting the rapid development and deployment of Internet access service to all Americans.[18] Additionally, the 1996 Act "reflects a clear preference that competitive markets, as opposed to regulated monopolies, be created and preserved as the mechanism for economic decision making," necessitating that the Commission be alert for mergers that threaten competition by eliminating competitors or "creating opportunities to disadvantage rivals in anticompetitive ways."[19]

1. The Commission May Only Approve the Proposed Transaction If It Finds the Transaction Will Affirmatively Enhance the Public Interest.

One well-established and vitally important aspect of the license transfer application process is that the Applicants bear the burden of proving that these agreements affirmatively serve the public interest.[20] Even if the proposed transaction would not overtly violate the Act or a Commission rule, the "Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes."[21] The proposed transaction must "*enhance*, rather than merely preserve, existing

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[18] *AOL/Time Warner Order*, ¶¶ 4, 12.

[19] *Id.* ¶ 15.

[20] *Applications Filed for the Transfer of Control of Insight Communications Company, Inc. to Time Warner Cable Inc.*, WC Docket No. 11-148, ¶ 7 (Jan. 31, 2012) (*Insight/Time Warner Order*); *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5673, ¶ 19 (2007) (*AT&T/BellSouth Order*).

[21] *Insight/Time Warner Order*, ¶ 7 (citing *Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, WC Docket No. 08-238, Memorandum Opinion and Order, 24 FCC Rcd 8741, 8745-46, ¶ 9 (2009) (*Embarq/CenturyTel Order*).

competition,"[22] and in its application review the Commission "takes a more extensive view of potential and future competition and its impact on the relevant market."[23]

For the proposed transactions, Applicants fail to meet their burden of demonstrating that the agreements will affirmatively serve the public interest. Indeed, the proposed deals will negatively impact the public interest and will undermine the purposes and goals of the Communications Act.

2. The Commission Has Broad Authority Over Spectrum Licensees.

Consistent with the overall purposes of the Communications Act, the Commission has broad statutory authority over licensees. In granting this authority, Congress has given the Commission power to create novel solutions that address the unique dangers posed by the proposed transactions at issue here. The Act's "terms, purposes, and history all indicate that Congress formulated a unified and comprehensive regulatory system,"[24] within which the Commission was "expected to serve as the single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio."[25]

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[22] *Insight/Time Warner Order*, ¶ 9 (emphasis added) (citing *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling That the Transaction Is Consistent with Section 310(b)(4) of the Communications Act*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, 17462, ¶ 28 (2008) (*Verizon/Atlantis Order*); *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, 12366, ¶ 32 (2008) (*XM/Sirius Order*)).

[23] *Insight/Time Warner Order*, ¶ 9 (citing *Verizon/Atlantis Order*, 23 FCC Rcd 17444, 17462, ¶ 28; *XM/Sirius Order*, 23 FCC Rcd 12348, 12366, ¶ 32).

[24] *United States v. Sw. Cable Co.*, 392 U.S. 157, 168 (1968) (quotation marks and citation omitted).

[25] *Id.* (quotation marks and footnotes omitted).

Within that system, Congress granted the Commission the exclusive authority to grant licenses under the Act.[26] A number of concerns, such as physical scarcity of broadcast frequencies under existing technologies and interference between broadcast signals, "led Congress to delegate broad authority to the Commission to allocate broadcast licenses in the 'public interest.'"[27] When the Commission decides "which entities are entitled to spectrum licenses under rules and conditions it has promulgated, it therefore exercises the full extent of its regulatory capacity."[28]

Courts have long recognized the Commission's "power to regulate broadcasting in the 'public interest.'"[29] This authority includes both the authority to deny an application and to place conditions on a license's use.[30] The Act requires that the Commission "must be satisfied that the public interest will be served by . . . the license."[31] The Commission's public interest inquiry "necessarily encompasses the broad aims of the Communications Act,"[32] which include a deeply rooted preference for preserving and enhancing competition; accelerating private-sector broadband deployment; ensuring a diversity of license holdings; ensuring the existence of a nationwide communications service, available to everyone; implementation of

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[26] *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 553 (1990), *overruled on other grounds*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

[27] *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978).

[28] *Nextwave Pers. Commc'ns, Inc. v. FCC*, 200 F.3d 43, 54 (2d Cir. 1999).

[29] *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. at 794.

[30] *P & R Temmer v. FCC*, 743 F.2d 918, 927 (D.C. Cir. 1984) ("An FCC licensee takes its license subject to the conditions imposed on its use. These conditions may be contained in both the Commission's regulations and in the license. Acceptance of a license constitutes accession to all such conditions. A licensee may not accept only the benefits of the license while rejecting the corresponding obligations.").

[31] *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946).

[32] *Insight/Time Warner Order*, ¶ 8 (internal quotations omitted).

Congress's policy framework designed to open all telecommunications markets to competition; the preservation and advancement of universal service; and generally managing spectrum in the public interest."[33] The Commission's public interest analysis will also inquire into how a proposed transaction "will affect the quality of communications services or will result in the provision of new or additional services to consumers," taking into account technological and market changes and trends within the communications industry.[34] As discussed below, the proposed transactions would undermine the goals of the Communications Act, and should therefore be blocked under the Commission's public interest review.[35]

For example, the Commission has exercised its broad authority over licensees in the mass media context when issuing its rules regarding local marketing agreements ("LMAs"),[36] and in regulating designated entities to prevent parties from thwarting the purposes of the Act and to promote diversity in communications ownership.[37] In keeping with the Commission's acknowledged comprehensive authority over licensees, the Commission must now consider all relevant ramifications of the Applicants' entire

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[33] *Id.* ¶ 8 (citing *AT&T/BellSouth Order*, ¶ 20; *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18301, ¶ 17 (2005) (*SBC/AT&T Order*); *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom Inc.*, WC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18030–31, ¶ 9 (1998) (*WorldCom/MCI Order*)); *AOL/Time Warner Order*, ¶ 22. *See* 47 U.S.C. §§ 254, 332(c)(7), 1302; Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153, Preamble; *cf.* 47 U.S.C. §§ 301, 303, 309(j), 310(d), 521(4), 532(a).

[34] *Insight/Time Warner Order*, ¶ 8.

[35] *See infra* Section I.B.

[36] *See* 47 C.F.R. §§ 73.3555, 73.3613.

[37] *See* 47 C.F.R. § 1.2110 (citing as statutory authority 15 U.S.C. § 79 *et seq.*; 47 U.S.C. §§ 151, 154(i), 154(j), 155, 157, 225, 303(r), and 309).

agreements. Section 310(d) of the Act requires the Commission to consider applications for transfer of Title III licenses under the same standard as if the proposed transferee were applying for the licenses under Section 308.[38] Thus, just as the Commission has a broad, encompassing authority over broadcast licensees generally, the Commission's authority under its public interest review of a proposed license transfer is equally expansive.

3. The Commission Has Authority to Inquire Into Third Parties' Influence or Control Over Licensees.

Even if the Commission determines that the agency and joint operating entity agreements are independent contracts, the agreements nevertheless pose issues of traditional concern for the Commission in reviewing license transactions. The question of another company's influence or control, financial or otherwise, over the programming decisions or core operating functions of a licensee is a traditional concern of the Commission. For example, the Commission's attribution rules "seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions."[39] In 1992, the Commission first adopted attribution rules for same-market radio LMAs to prevent increased common ownership that would undermine the Commission's competition and diversity goals

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[38] *See, e.g.*, *Verizon/Atlantis Order*, ¶ 26; *Applications of Guam Cellular and Paging, Inc. and DoCoMo Guam Holdings, Inc.*, WT Docket No. 06-96, Memorandum Opinion and Order and Declaratory Ruling, 21 FCC Rcd 13580, 13588, ¶ 13 (2006) (*DoCoMo/Guam Cellular Order*); *SBC/AT&T Order*, 20 FCC Rcd 18290, 18300 n.60.

[39] *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, Report and Order and Third Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008) (citing *1999 Attribution Order*, 14 FCC Rcd at 12560, ¶ 1).

under the Act.[40] More recently, the Commission extended attribution rules to television LMAs,[41] and has inquired into expanding attribution rules further to local news service agreements and shared service agreements.[42] The Commission's rules here acknowledge that even if an entity does not hold a majority interest in a licensee that entity may be able to exercise control over it. In examining the financial and other interests created by the cross-sales and joint venture components of the Applicants' agreements, the Commission is simply consistently addressing its recognition that unmonitored third party influence and control over licensees can thwart the purpose of the Commission's rules entirely.

The proposed agreement, taken as a whole, poses serious concerns about the ability of the SpectrumCo members or Cox to influence Verizon Wireless, and vice versa, with regard to decisions that affect their ability to compete with each other. Such influence could affect what should be the Applicants' independent decisions on questions of pricing, lines of business, and the rates they charge each other in intercarrier compensation. Once again, this concern also presents the possibility that the Applicants may be able to collude to the disadvantage of their competitors and ultimately to the detriment of consumers. The Commission must answer these questions and assure itself that the transactions, viewed in their entirety to include the cross-sale and joint venture

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[40] *See* 47 C.F.R § 73.3555; *see also Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, MM Docket No. 01-317, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19861, 19894, ¶ 82 (2001).

[41] *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, Report and Order, 14 FCC Rcd 12559, 12612, ¶ 83 (1999) (*1999 Attribution Order*).

[42] *2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182, *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, Notice of Proposed Rulemaking, ¶ 204 (2011).

agreements, does not allow one entity to exert inappropriate and anticompetitive influence or control over another.

4. The Totality of the Circumstances Gives Rise to Concerns of Collusion.

Consistent with its broad authority to evaluate the proposed transactions with an eye to the agreements' effect on the public interest and the public policies of the Communications Act, the Commission should recognize that the totality of the circumstances in the proposed transactions gives rise to concerns of collusion. The Commission need not blindly accept the Applicants' assertion that the proposed license transfers are wholly unrelated to the Applicants' simultaneously negotiated agency and joint operating entity agreements. Quite the contrary: a thorough and responsible public interest analysis here requires examination of all parts of the Applicants' overall agreement and a finding of how those components will affect the provisions and policies of the Act.

The United States Supreme Court has recognized that the Commission "is permitted to take antitrust policies into account in making licensing decisions pursuant to the public-interest standard."[43] These policies include competition concerns that arise from agreements that increase an entity's anticompetitive power across different communications technologies.[44] Here, the Commission must look into the Applicants' entire agreement, including those parts concerning Applicants' intent to exclusively sell each other's services setting forth a plan to collectively develop—and collectively license—technologies that potentially have great import to other companies' ability to

[43] *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 795–96 (1978) (citing *United States v. Radio Corp. of Am.*, 358 U.S. 334, 351 (1959); *Nat'l Broad. Co., Inc. v. United States*, 319 U.S. 190, 222–24 (1943)).

[44] *See United States v. Radio Corp. of Am.*, 358 U.S. 334, 351–52 (1959).

compete.[45] For example, the agreements would increase Verizon's leverage over adjacent markets for devices through handset exclusivity arrangements. Verizon's increased dominance would also decrease competition for special access services; first, by increasing the areas in which Verizon has market dominance or an outright monopoly as a special access service provider, and second, by preventing the spectrum from being acquired by a potential competitor, to whom Verizon would need to provide special access services at a just and reasonable rate.

It is absurd to imagine that a license transfer, cross-sale agreements, and a joint venture are completely unrelated when those agreements were all negotiated at the same time, between the same parties, all relating to communications services. Tellingly, Verizon Wireless has negotiated the exact same deal with Cox Communications as it negotiated with the three SpectrumCo members, while not one cable company that lacked spectrum holdings was included in the pact. If the agency and joint venture agreements were indeed separate from the license transfer, one would expect that cable companies who could not offer a license transfer would have been welcome at the table for the agency and joint venture agreements.

5. *The Proposed Joint Operating Entity Poses Serious Antitcompetitive Harms.*

Verizon and the cable companies also propose to create a joint operating entity "to develop innovative technology and intellectual property that will integrate wired video, voice and high-speed Internet with wireless technologies."[46] This would create serious anticompetitive harms, allowing the parties to monopolize new technologies that

[45] For a more detailed analysis of the Joint Operating Entity, see Confidential Appendix.

[46] Verizon/SpectrumCo Public Interest Statement, 24 n.71. *See also* Verizon/Cox Public Interest Statement, 20 n.62.

are necessary for converging networks to interoperate. For example, the companies would have an incentive to develop handset technology that can easily hand off calls between their respective networks, but not between others, or proprietary signaling technologies that would thwart efforts to develop nationwide standards for communications. In particular, the companies would have the means and motivation to develop proprietary standards for the delivery of video over broadband, inhibiting the development of independent online video providers and putting their competitors at a disadvantage.

Generally, independent companies have an incentive to share their technologies with the industry as a whole, because they benefit from standardization and economies of scale. But that incentive is lost when some of the largest players in the communications market agree to work together on technology and marketing, to the exclusion of everyone else. The Applicants should not be able to use technology or their jointly-held patents to lock in their anticompetitive ambition to segment and control the communications marketplace. But the proposed joint venture allows them to do this, and it should be blocked.

B. The Commission Must Block the License Transactions Because They Would Undermine the Goals of the Communications Act.

The Commission must block any license transactions that are contrary to the public interest.[47] When the Commission evaluates whether a particular transaction should go forward, it "considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or

[47] *See* 47 U.S.C. § 310(d).

related statutes."[48] In so doing, the Commission does not only consider the immediate, day-after effects of a transaction—it ensures that the transaction will not harm the market's future development. In other words, the Commission must consider whether the transaction "will result in the provision of new or additional services to consumers . . . [and it] may consider technological and market changes, as well as trends within the communications industry, including the nature and rate of change."[49]

The transactions before the FCC in this docket are complex, consisting not only of the proposed transfers of wireless licenses, but of a series of contracts creating a joint operating entity and marketing arrangements.[50] Considered as a whole, these transactions would harm the public interest because they would frustrate many objectives of the Communications Act, today and in the future. As a result, the Commission should block the transactions.

1. Decreased Competition in the Wireless Market.

By proscribing the limits of competition between Verizon and cable companies, and by harming the overall competitive landscape, the proposed transactions would frustrate several goals of the Act that depend on competition between providers. After the transactions, there will be no possibility that the cable companies will enter the wireless market, and it is unlikely that Verizon will build out new landline or fiber infrastructure

[48] *Embarq/CenturyTel Order*, 24 FCC Rcd 8741, 8745–46, ¶ 9.

[49] *Insight/Time Warner Order*, ¶ 8.

[50] If the Commission considers the joint agreements to be separate from the license transfers, it must block the license transfers as contrary to the public interest. For the reasons described in Section I.C, even without the joint agreements the license transfers raise significant concerns that warrant denying the transfer. But assuming the joint agreements separately go forward (perhaps to be addressed in a parallel proceeding by the FCC, the Federal Trade Commission, or the Department of Justice), it would harm the public interest to allow companies engaged in separate questionable arrangements to further their anticompetitive goals by transferring spectrum licenses between themselves.